68749-2

68749-2

No. 68749-2-1

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL SAVINGS,

Appellant,

v.

MICHAEL P. KLEIN,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The superior court erred in entering summary judgment against Washington Federal, which "must be given the benefit of every favorable inference which reasonably may be drawn from the evidence." Jacob's Meadow Owners Association v. Plateau 44 II, LLC, 139 Wn. App. 743, 765, 162 P.3d 1153 (2007). At a minimum, there is a genuine issue of fact as to whether the personal representative (the "PR") ever mailed the statutory notice of claim to Washington Federal, and therefore whether it filed its creditor's claim in a timely manner.

The established facts also underscore the erroneousness of granting summary judgment against Washington Federal:

- The borrower and decedent, Dr. Robert Klein, owed Washington Federal more than $355,000 on the loan he obtained from it so that he could acquire a Tacoma condominium (the "condo"), and the amount owed Washington Federal far exceeds the value of the condo.
- The borrower's estate is solvent, with more than enough assets to pay the remaining unsecured balance on his Washington Federal loan and all other debts and expenses.
- The PR was fully aware of the loan, the debt owed on it,

and Washington Federal's desire to be paid in full.

- Washington Federal had procedures in place to ensure that if probate notices were sent to it, they would be identified upon receipt, logged and promptly dealt with.
- Washington Federal did not receive a probate notice to creditors with respect to the borrower's estate until the PR filed the petition in this case, and its records reflect that.
- Washington Federal filed its creditor's claim 13 days after first receiving the probate notice to creditors.

In granting the PR's motion for summary judgment, the superior court erroneously disregarded the existence of an issue of fact as to whether appropriate statutory notice was "actually given" as required. In doing so, the court provided the borrower's solvent estate with a windfall.

The PR seeks to justify this windfall by accusing Washington Federal of making a "poor business decision" in loaning his father the money to buy his condo, because the condo is now worth much less than the amount owed on the loan. Brief of Respondent ("BR"), pp. 2-3.

The PR ignores Washington Federal's reliance on the substantial other assets of the PR's physician father, as well as the condo as security. Washington Federal looked to both the borrower and the collateral as

sources of repayment. The PR's previous sworn statement demonstrates that Washington Federal made its loan to someone with ample assets to repay it. CP 185-86. That hardly qualifies as a "poor business decision". In any event, Washington Federal's agreement to loan the borrower money provides no basis for helping the PR avoid repaying that loan.

This Court should reverse the entry of summary judgment against Washington Federal and remand the case for further proceedings.

II. ARGUMENT

A. A Genuine Issue of Material Fact Exists and Accordingly the Superior Court Erred in Entering Summary Judgment.

1. The Evidence Washington Federal Submitted in the Superior Court Is Part of the Appellate Record to Be Considered by this Court.

The PR argues that this Court should ignore much of the evidence that Washington Federal submitted in the superior court, evidence that demonstrates the existence of a genuine issue of material fact. BR, pp. 26-27 n. 3. The Court should reject this argument. What the PR urges is contrary to the established standards governing this appeal. As this Court has stated previously:

> It is our task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court. Wash Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 163, 849 P.2d 1201 (1993); Green v. Normandy Park, 137 Wn. App. 665, 678, 151 P.3d 1038 (2007). That record includes those

> documents designated in an order granting summary judgment and any supplemental order of the trial court. RAP 9.12.

Jacob's Meadow, 139 Wn. App. at 754-55.

Here, all of the evidence Washington Federal has cited and relied upon on appeal was identified and listed by the superior court in its April 11, 2012 order granting summary judgment. CP 388-90. Thus, that evidence is part of the record on appeal. As this Court has previously held, it has a "duty" to review the superior court's ruling on summary judgment on the record that includes that evidence. See Jacob's Meadow, 139 Wn. App. at 756; see also RAP 9.12.

2. The Evidence in the Record, Viewed in the Light Most Favorable to Washington Federal as it Must Be, Demonstrates that Summary Judgment Is Unwarranted.

a. Washington Federal Did Not Receive the Probate Notice to Creditors that the PR Claims Was Mailed in January 2011.

As set forth at length in Washington Federal's opening brief, there is extensive and detailed evidence that it did not receive the probate notice to creditors that the PR claims was mailed in January 2011.

The PR suggests that perhaps Washington Federal chose not to file a claim sooner because it did not "worry" about the condo's value being less than the amount owed on the loan. BR, p. 2. This unsubstantiated speculation is contrary to the undisputed facts. The **evidence** is that

Washington Federal first received the probate notice to creditors, and first learned of the need to file a creditor's claim, in late April 2011—and promptly filed its claim. (Up to that point, the PR had notified Washington Federal only that he would continue to make monthly payments on the debt—and he had continued to do so. CP 111; 104.)

Moreover, it is undisputed that, far from not "worrying" about filing probate creditors' claims, Washington Federal had careful and thorough policies and procedures in place to identify, log and track any probate notice to creditors sent to it, and to make sure that it filed a timely creditor's claim once it received any such notice. CP 193-94; 218. The uncontroverted evidence is that use of Washington Federal's claim filing process was not triggered here because the bank did not receive the January 2011 notice the PR alleges was sent. CP 191-94; 217-18.

The PR asserts that "WaFed did not file and serve its creditor's claim until one year after it received notice from the PR, on May 10, 2011." BR, p. 6. There is no factual basis for asserting that Washington Federal received notice in May 2010, and the PR's citations to the record do not support that assertion. The undisputed evidence is that Washington Federal first received the probate notice to creditors 11 months after that,

when a copy came with the PR's petition for instructions. CP 194.[1]

The PR asserts that his December 29, 2010 Affidavit of Reasonable Diligence "corroborated" his January 21, 2010 letter to Washington Federal about his father's death and the probate proceedings (in which he represented he would be making monthly loan payments). BR, p. 5. In fact, as Washington Federal pointed out in its opening brief, that affidavit inaccurately stated that the PR had instructed **all** creditors to send any creditor's claims to his attention. The PR's January 21, 2010 letter to Washington Federal actually said nothing at all about submitting a creditor's claim. CP 150.

The PR now asserts that these 2010 documents are not "germane" to this appeal. BR, p. 5 n. 1. If nothing else, though, the inaccuracy of the PR's representation in his December 29, 2010 Affidavit further undermines the credibility of his assertions about the purported January 2011 sending of a probate notice to creditors to Washington Federal, and helps demonstrate why the superior court erred.

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[1] The PR did not accept the superior court commissioner's May 2011 ruling that Washington Federal was entitled to recover the full amount owing on the loan. Nevertheless, the PR quotes the commissioner's comment that Washington Federal "got the notice". BR, p. 7. There was no evidence of receipt of a January 2011 notice; the record shows that Washington Federal did not receive the notice until late April 2011.

The PR asserts without citation that Washington Federal never suggested below that discovery was necessary to resolve a factual dispute about whether it received actual notice. BR, p. 8. The question, however, is not whether discovery took place; the question is whether, making all reasonable inferences in favor of Washington Federal, the evidence in the record establishes a genuine issue of material fact. It does.

There will be a need for discovery if the Court remands the case for trial, as it should. Washington Federal had no obligation, however, to conduct discovery in order to defend against a CR 56 motion and to argue and show the existence of a genuine issue of material fact.

b. An Issue of Fact Exists as to Whether the PR Gave Actual Notice to Washington Federal.

In the PR's appellate brief, he addresses at length certain probate procedures and principles. BR, pp. 11-15. As set forth in its opening brief, Washington Federal agrees that the probate creditor claim statute, Chapter 11.40 RCW, and related Washington probate provisions, apply here, as informed by the requirements of the Due Process Clause of the United States Constitution. Washington Federal does not contend that its claim for recovery on the loan is exempt from Washington's statutory probate procedures. See Opening Brief, pp. 16-19.

Rather, the central issue on appeal is whether there is an issue of

fact regarding whether the PR gave Washington Federal "actual notice" as required by Chapter 11.40 RCW and the United States Constitution, and therefore whether an issue of fact exists as to the timely filing of Washington Federal's creditor's claim.[2]

The PR challenges Washington Federal's emphasis on the lack of receipt of notice in January 2011. The PR ignores the non-receipt cases Washington Federal cited from states with probate notice statutes that, like Washington's, speak of "mailing" actual notice. See Opening Brief, pp. 19-20; 2009 Kan. Stat. Ann. 59-2236; Miss. Code Ann. § 91.7.145.

The PR relies heavily on Orix Financial Services v. Phipps, 2009 WL 30263 (S.D.N.Y.), 72 Fed. R. Serv. 3d 400 (2009), in seeking to justify the superior court's decision in this case. The PR disregards key distinguishing facts of Orix, which in addition did not involve a summary judgment motion and related standards and requirements. The analysis and discussion in Orix do not show that summary judgment was warranted here, given the factual issues present. Indeed, it is evident even from Orix

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[2] Washington Federal did argue below, and Judge North agreed, that the special notice provisions of the deed of trust on the condo required confirmation of receipt of the probate notice to creditors. Washington Federal is not arguing on appeal that the provisions of the deed of trust add to the notice requirements otherwise established by Washington statute and the United States Constitution.

that the purported recipient of a mailed notice may raise and establish an issue of fact about whether the notice was actually sent.

In Orix, the issue was whether a default judgment should be vacated. The evidence of service of the summons and complaint was solid. The plaintiff sent them to the defendant by both first-class **and** certified mail—there was "definitive proof" that the plaintiff had "properly mailed notice." Id. at 11. The plaintiff also delivered copies to the defendant's registered agent, who then mailed them to the defendant. Id. The defendant had an attorney who communicated with her about the case and "clearly put [her] on notice of the proceedings." Id. at 11 n. 4.

Here, unlike in Orix, there was no "definitive proof" of proper mailing. On the contrary, even in the PR's submissions there is at best ambiguous evidence, from those who apparently lack personal knowledge, that the notice was mailed. The summary judgment standard governing this appeal requires that these ambiguities and uncertainties, and the lack of established personal knowledge, be construed against the PR.

It would be particularly inappropriate to apply a lower standard in this kind of case, and thereby to create incentives not to ensure that required notices are in fact given. Just as the PR, if he prevails, will create a substantial windfall for his father's estate at the expense of a bona fide

creditor that never received the required statutory notice, many other estates would stand to gain if inadequate evidence of mailing is allowed, on a motion for summary judgment, to overcome conflicting evidence.

Along with the ambiguities and uncertainties in the PR's own evidence, there is overwhelming evidence from Washington Federal of non-receipt. This evidence also helps establish an issue of fact about whether notice was in fact sent. Opening Brief, pp. 29-33. See also Tassoni v. Dep't. of Ret. Sys., 108 Wn. App. 77, 87, 29 P.3d 63 (2001) (presumption of mailing of notice rebutted where receipt of notice was credibly denied, no copy was in the file at the office where the notice would have been received, and the person responsible for placing such notices in the file testified that she did not remember receiving it).

The discussion in Orix is not to the contrary. There, the court cited authority that "'denial of receipt of notice, **without more**, is insufficient to rebut the presumption that notice was properly delivered through the mail.'" Id. at 11 (citation omitted; emphasis added). Here there is much more than mere denial of receipt by the addressee, Barbara Peten. Even considering only the Washington Federal submissions, there is extensive evidence of its established procedures for identifying, logging and tracking notices such as a probate notice to creditors—and undisputed evidence of

the complete absence of any record of such notice in the relevant files. CP 191-94.

c. Washington Federal Is Not Relying on Inadmissible Hearsay to Establish That an Issue of Fact Exists.

The PR argues that the Washington Federal declarations rely on inadmissible hearsay. BR, p. 26. Evidence of the absence of particular records or data regularly made and preserved by a business is a well-recognized hearsay exception, however. See ER 803(a)(7). The hearsay rules do not bar such evidence when it is offered to prove the nonoccurrence or nonexistence of a matter. Id.

The evidence Washington Federal submitted on the notice issue is precisely the kind deemed to be persuasive regarding whether events that would give rise to an accelerated filing deadline actually took place. Evidence of the "routine practice of an organization" is relevant to prove that the conduct of the organization "on a particular occasion" was " in conformity with the routine practice." ER 406. Moreover, Washington Federal witnesses are competent to testify to matters within their personal knowledge and responsibilities. ER 601, 602.

As described in more detail in Washington Federal's opening brief (see pp. 9-10; 29-31), Washington Federal has "standard policies and procedures in place for handling incoming mail, and specifically Probate

Notices to Creditors." CP 193-94. The procedures include placing the original paper notice in the relevant loan file and "making an electronic notation of receipt of the Notice in the electronic servicing notes for the specific loan account." Id. There is no copy of a probate notice to creditors for the borrower's estate in the relevant loan file and no notation of receipt in the relevant electronic servicing notes. CP 194.

The PR challenges Betsy Nelson's testimony about other employees' non-receipt of any notice to creditors. BR 26. Testimony regarding Washington Federal's policies and procedures, and the absence of any indication in its files of receipt of a probate notice to creditors, is significant and undisputed. Given that the addressee of the January 2011 letter on which the PR relies is Barbara Peten, Ms. Nelson's testimony about other employees' denials is far less important than the sworn testimony of Ms. Peten herself. Her declaration is part of the record, and she flatly denies receiving the notice and states that (in keeping with Washington Federal's general business practices) there would be a record of it if she had received it. CP 217-18. It is undisputed that there is none.

d. The Mailbox Rule Supports Reversal of the Superior Court Ruling.

In its opening brief, Washington Federal cited and relied on Washington's familiar common law mailbox rule, which also supports reversal of the superior court order. Opening Brief, pp. 31-33. As stated in Tassoni v. Dep't. of Ret. Sys., 108 Wn. App. 77:

> Under Washington law, a party seeking to prove mailing must show (1) an office custom with respect to mailing *and* (2) compliance with the custom in the specific instance.

Id. at 86 (italics in original; citation omitted). Because the PR did not personally mail the probate notice to creditors to Washington Federal, instead relying on his former attorney, and no showing of that attorney's office custom with respect to mailing or compliance with that custom was made, a genuine issue of material fact remains as to whether the probate notice to creditors was actually mailed.

The PR urges this Court to disregard the mailbox rule, insisting that "[i]f the legislature had intended for the mailbox rule to apply to probate proceedings it would have codified the rule or its language in the probate statute." BR, p. 18. The PR fails to address the various mailbox rule cases Washington Federal cited to demonstrate that summary judgment was wrongly granted here. See Opening Brief, pp. 31-33.

As Washington Federal pointed out previously, the mailbox rule

provides an appropriate framework and set of principles in this case. Id. Failure to comply with the mailbox rule not only rebuts any presumption of receipt but precludes a finding of proper mailing of a notice as required by statute. See Tassoni, 108 Wn. App. at 87. In addition, the PR's insistence that the rule must be ignored here because the Legislature failed to include or refer to it in the probate statute ignores basic notions of statutory interpretation and reliance on the common law.

It is well-established that a court may look to the common law to help construe or interpret a statute. State v. Berry, 200 Wash. 495, 509, 93 P.2d 782 (1939). The common law also "may serve to fill interstices that legislative enactments do not cover." In re Parentage of L.B., 155 Wn.2d 679, 689, 122 P.3d 161 (2005) (internal quotation omitted).

Moreover, "[t]he Legislature is presumed to know existing case law in areas in which it is legislating, and thus, common law may be considered in ascertaining the proper scope of a statute." Wash. Fed'n of State Emps. v. Joint Center for Higher Educ., 86 Wn. App. 1, 7, 933 P.2d 1080 (1997) (citing In re King Cnty. for Foreclosure of Liens, 117 Wn.2d 77, 86, 811 P.2d 945 (1991)). In addition, because the Legislature is presumed to have that knowledge, "a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed

its intention to vary it." Price v. Kitsap Transit, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) (citations omitted). "Absent an indication that the Legislature intended to overrule the common law, new legislation will be presumed to be consistent with prior judicial decisions." Matter of Marriage of Williams, 115 Wn.2d 202, 208, 796 P.2d 421 (1990) (citations omitted).

Thus, the mailbox rule remains an appropriate one to apply here. There is no indication that the Washington Legislature intended for it to be ignored in this context. It would make little sense to do so, given the constitutional significance of giving "actual notice" and the potential impact on the due process rights of those involved if it were ignored.

The PR has submitted no evidence of any office custom with respect to mailing or of compliance with any such custom in this instance. Ms. Favretto's statement, in the alternative, that she "caused" the purported notice to be mailed can only be understood to mean that she gave it to some unidentified person to mail. That does not establish mailing as an uncontested fact, particularly in conjunction with the other evidence. The declarations of the PR and his former attorney also fail to establish actual mailing of the statutory notice to Washington Federal.

The PR asserts that Ms. Favretto's affidavit "[t]rack[s] the

language of RCW 11.40.020(1)," but in fact it does not. Nothing in the statute uses the language "I have given, or caused to be given" that Ms. Favretto's affidavit contains. The PR does not dispute that this language suggests that Ms. Favretto failed to actually mail a notice to Washington Federal herself, instead leaving certain steps in that process to unspecified others—none of whom have submitted an affidavit claiming that they carried out the process.[3] The PR cites Brackman v. City of Lake Forest Park, 163 Wn. App. 889, 262 P.3d 116 (2011), but there the court actually held that the certificate in question did not suffice to establish proof of service. Id. at 898.

The PR argues that no Washington case has applied the mailbox rule in a probate proceeding, and that therefore the rule does not apply. BR, p. 19. The PR cites no authority rejecting the application of the rule here, though, and the Washington authorities cited above strongly support looking to such a rule of general application in this case, regardless of whether the issue has come up before in a probate appeal.

Applying the mailbox rule would not mean invalidating proper

[3] The PR notes that RCW 11.76.040 uses the term "cause to be mailed". That is not the language of RCW 11.40.026(1)(c), the statute at issue here. In any event, the language used in RCW 11.76.040 does not bear on whether notice actually was mailed to Washington Federal in January 2011.

probate notice, as the PR argues. BR 19. The mailbox rule is simply a tool to help assess allegations of mailing of notices like the one at issue in this case. Whether a particular notice was mailed ultimately is a question of fact, and must be susceptible to question and challenge. The mailbox rule helps determine whether a party claiming to have mailed a document can be conclusively presumed to have done so. Applying the rule here, it is evident that at a minimum a genuine issue of material fact exists as to whether the notice to creditors was properly mailed at a time that would make Washington Federal's creditor's claim untimely.

It will sometimes be in an estate's interest that creditors not file their claims on time, and therefore to delay giving a creditor actual notice. Particularly when actual notice is not given during the initial four-month creditor claim period, it makes little sense to put a PR's assertions of mailing beyond challenge. Where, as here, the evidence raises questions about whether a purported mailing of notice to a creditor actually occurred, the determination cannot be resolved on summary judgment. All doubts about whether a genuine issue of material fact exists are to be resolved against the moving party. Atherton Condo Ass'n v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

That the mails generally may be relied upon to deliver notice where

sent, as the PR argues, does not mean that a PR can forego sufficient proof to establish mailing, or that an issue of fact as to actual mailing cannot be raised. Nor would it make sense, or reflect sound public policy, to require a purported addressee to raise an issue of fact based entirely on the purported sender's own testimony and records.[4]

The PR argues that Washington Federal is insisting on an unreasonable degree of involvement by lawyers and legal assistants in mailing statutorily required notices. BR, p. 25. The PR is mistaken. The question is not one of certification in the ordinary course, but instead whether an affidavit of mailing like the one in question is conclusive when a dispute arises. An issue of fact as to mailing exists where, among other things, there is nothing more definitive from the purported sender than there is here, no compliance with the mailbox rule, and extensive and compelling evidence of non-receipt.

Washington Federal's assertions are not novel, and would not "eviscerate" the effectiveness of notice by mail. See BR, p. 28. Rather, Washington Federal's argument is consistent with those adopted in cases like Tassoni, 108 Wn. App. 77. It is the PR's position that is extreme. In

[4] Of course, in this case issues of fact are raised by the evidence from both the purported sender and the party entitled to "actual notice."

his view, a creditor who does not receive a probate notice to creditors and introduces substantial evidence that the notice was not mailed must be forever barred by an ambiguous and conclusorily worded affidavit of mailing. This Court should not endorse that view, and the resulting windfall—particularly on a summary judgment motion, where all facts and reasonable inferences must be construed in favor of the non-moving party.

e. Estate of Earls Does Not Compel Denial of Washington Federal's Appeal.

The PR relies on In re Estate of Earls, 164 Wn. App. 447, 262 P.3d 832 (2011), in contending that Washington Federal's creditor's claim is barred to the extent it is unsecured. BR, p. 22.[5] Estate of Earls compels no such result. That case involved a contingent claim on a personal guarantee; the specific issue addressed by the court there was whether contingent creditors' claims need to be filed by creditors holding such claims. There was no question of whether actual notice had been given. The PR had mailed the probate notice to creditors to the claimant by **certified** mail, less than a week after publication.

In this case, by contrast, the PR relies on ambiguous, limited and

[5] The PR acknowledges that, regardless of the outcome of this appeal, Washington Federal retains its security interest in the condo the borrower obtained with the loan proceeds and can enforce its deed of trust on the condo property. BR 21.

suspect evidence to claim to have given actual notice to Washington Federal—over a year after the probate notice to creditors was published. Unlike in Estate of Earls, there also is other evidence raising doubt about the claimed mailing. That evidence includes Washington Federal's extensive evidence of non-receipt, as well as at least one previous sworn statement of notice by the PR that is demonstrably inaccurate as to Washington Federal. See CP 111; 150-51; 191-94; 217-18.

f. The Evidence and Issues Washington Federal Has Identified Are Not Barred by RAP 9.12 and 2.5(a).

The PR wrongly argues that Washington Federal "did not raise any issue with regard to Ms. Favretto's affidavit in the trial court," and therefore this Court should decline to consider this issue on appeal. BR, pp. 23-24. The PR relies on RAP 9.12 and 2.5(a).

RAP 9.12 provides that on review of a summary judgment order, "the appellate court will consider only evidence and issues called to the attention of the trial court." As discussed previously, the evidence to which Washington Federal points is all part of the superior court record, which that court identified in its summary judgment order. CP 388-90. The main issue on appeal is simply the existence of genuine issues of material fact as to whether "actual notice" was given to Washington Federal, including whether the probate notice to creditors was ever mailed

to it, and whether the superior court erred in its application of CR 56.

RAP 2.5(a) states that an appellate court "may refuse to review any claim of error which was not raised in the trial court." The application of RAP 2.5(a) is a matter of the reviewing court's discretion. Obert v. Envtl. Research & Dev. Corp., 112 Wn.2d 323, 333, 771 P.2d 340 (1989). This Court should reject the PR's request that it employ RAP 2.5(a) to ignore the defects in the Favretto affidavit. The superior court record is somewhat dense and complicated, but the issues and claims of error Washington Federal is pursuing on appeal are ones that were raised below.

In the superior court, Washington Federal disputed the PR's entitlement to summary judgment on this record, "both legally and factually." CP 153. Washington Federal argued below that, among other things, there were issues of fact regarding mailing of the probate notice to creditors, precluding entry of summary judgment against it.

When the PR first moved for summary judgment in February 2012, he relied largely on his own declaration and accompanying exhibits. CP 70, 97-150. The exhibits included copies of a letter signed by his former attorney and dated January 28, 2011, and the January 28, 2011 Favretto affidavit. The PR did not submit new affidavits or declarations from either the attorney, George Smith, or Ms. Favretto.

Washington Federal's response included challenges to the lack of foundation and personal knowledge of the PR, and the absence of evidence on various pertinent facts, including about the purported mailing of the probate notice to creditors and its preparation and handling. See CP 168-70. Washington Federal specifically referred to the "given, or caused to have given" language in the Favretto affidavit. CP 170.

The PR then filed a reply brief accompanied by a declaration from Mr. Smith, who in turn attached the January 2011 Favretto affidavit and discussed it. CP 321-341. Washington Federal filed objections to the new evidence and raised a number of challenges to the Smith declaration, and pointed out the absence of evidence on various issues related to the purported mailing of notice. CP 369-78. Washington Federal specifically referred to the "caused" language, albeit in Mr. Smith's declaration, not Ms. Favretto's affidavit. CP 373-74.

After the superior court entered summary judgment, Washington Federal moved for reconsideration. CP 391-402. Washington Federal challenged the evidence the PR had relied upon, and asserted that the court had "[f]ailed to view the evidence most favorably to the non-moving party". CP 392. Among other things, Washington Federal argued that the court "failed to recognize the existence of a triable material factual issue

about whether the legal assistant *ever* mailed [the] claims bar notice to WaFed." CP 395. Washington Federal also identified numerous specific inadequacies and omissions in the Favretto affidavit. CP 402.

Thus, Washington Federal's assertion on appeal that issues of fact made entry of summary judgment erroneous is one that it made in the trial court as well, including in particular challenges to the Favretto affidavit and other evidence offered by the PR with respect to mailing.

Even if this Court were to conclude that RAP 2.5(a) is implicated here, there are ample grounds for considering Washington Federal's arguments on appeal in full. RAP 2.5(a) provides that a party may raise for the first time on appeal a failure to establish facts upon which relief can be granted and manifest error affecting a constitutional right. This case implicates the Due Process Clause, and for the PR to prevail on summary judgment the material facts must be undisputed.

In addition, even where an issue might not be clearly framed in the court below, an appellate court need not refuse to consider the issue if the trial court had sufficient notice of it to know what legal precedent was pertinent. East Gig Harbor Imp. Ass'n v. Pierce Cnty., 106 Wn.2d 707, 709-10 n.1, 724 P.2d 1009 (1986) (parties argued issue and discussed relevant authority).

Appellate courts also have inherent authority to address an issue not raised below if it is needed for a proper decision. See Bennett v. Hardy, 113 Wn.2d 912, 918-19, 784 P.2d 1258 (1990); Falk v. Keene Corp., 113 Wn.2d 645, 659, 782 P.2d 974 (1989).

B. This Court Should Reverse the Award of Attorneys' Fees and Reject the PR's Request for Fees on Appeal.

As discussed above, the superior court's entry of summary judgment against Washington Federal should be reversed. Accordingly, the award of attorneys' fees to the PR should be reversed, too, and the Court should deny the PR's request for an award of attorneys' fees and costs on appeal pursuant to RAP 18.1(a).[6]

III. CONCLUSION

Genuine issues of material fact exist, and the superior court erred in entering summary judgment in favor of the PR. The record does not establish, as a matter of law, that "actual notice" was given to Washington Federal and therefore that its filed creditor's claim was untimely. To allow the superior court's decision to stand would provide a windfall recovery to the PR, not—as the PR contends—Washington Federal, which merely

[6] Washington Federal has not requested an award of attorneys' fees on appeal, because reversal and remand will not result in a final decision on the merits. Washington Federal reserves its right to recover its fees and costs at a later date.

seeks to enforce a valid claim against a fully solvent estate.

This Court should reverse the superior court's summary judgment order and fee award, and remand the case for further proceedings.

Dated this 28th day of January, 2013.

RIDDELL WILLIAMS P.S.

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APPENDIX

Kansas Statutes

[search]

Browsable and searchable archive of 2009 Kansas Statutes Annotated (K.S.A.)

Chapter 59: Probate Code

Article 22: Probate Procedure

Statute 59-2236: Notice to creditors.(a) The publication notice to creditors shall be to all persons concerned. It shall state the date of the filing of the petition for administration or petition for probate of a will and shall notify the creditors of the decedent to exhibit their demands against the estate within four months from the date of the first published notice as provided by law and that, if their demands are not thus exhibited, they shall be forever barred. The notice to creditors required by this section shall be combined with the notice for probate or administration required by K.S.A. 59-2222 and amendments thereto, except that, if the notice required pursuant to K.S.A. 59-2222 and amendments thereto is waived pursuant to K.S.A. 59-2223 and amendments thereto, the notice to creditors required by K.S.A. 59-709 and amendments thereto and this section shall be published separately.

(b) Actual notice required by subsection (b) of K.S.A. 59-709, and amendments thereto, may include, but not be limited to, mailing a copy of the published notice, by first class mail, to creditors within a reasonable time after their identities and addresses are ascertained.

History: L. 1939, ch. 180, § 212; L. 1972, ch. 215, § 15; L. 1975, ch. 299, § 20; L. 1976, ch. 245, § 4; L. 1985, ch. 191, § 37; L. 1989, ch. 173, § 4; July 1.

MISSISSIPPI CODE of 1972

*** Current through the 2012 Regular Session ***

TITLE 91. TRUSTS AND ESTATES
CHAPTER 7. EXECUTORS AND ADMINISTRATORS

Miss. Code Ann. § 91-7-145 (2012)

§ 91-7-145. Notice to creditors of estate

(1) The executor or administrator shall make reasonably diligent efforts to identify persons having claims against the estate. Such executor or administrator shall mail a notice to persons so identified, at their last known address, informing them that a failure to have their claim probated and registered by the clerk of the court granting letters within ninety (90) days after the first publication of the notice to creditors will bar such claim as provided in Section 91-7-151.

(2) The executor or administrator shall file with the clerk of the court an affidavit stating that such executor or administrator has made reasonably diligent efforts to identify persons having claims against the estate and has given notice by mail as required in subsection (1) of this section to all persons so identified. Upon filing such affidavit, it shall be the duty of the executor or administrator to publish in some newspaper in the county a notice requiring all persons having claims against the estate to have the same probated and registered by the clerk of the court granting letters, which notice shall state the time when the letters were granted and that a failure to probate and register within ninety (90) days after the first publication of such notice will bar the claim. The notice shall be published for three (3) consecutive weeks, and proof of publication shall be filed with the clerk. If a paper be not published in the county, notice by posting at the courthouse door and three (3) other places of public resort in the county shall suffice, and the affidavit of such posting filed shall be evidence thereof in any controversy in which the fact of such posting shall be brought into question.

(3) The filing of proof of publication as provided in this section shall not be necessary to set the statute of limitation to running, but proof of publication shall be filed with the clerk of the court in which the cause is pending at any time before a decree of final discharge shall be rendered; and the time for filing proof of publication shall not be limited to the ninety-day period in which creditors may probate claims.

HISTORY: SOURCES: Codes, Hutchinson's 1848, ch. 49, art. 1 (115); 1857, ch. 60, art. 81; 1871, § 1135; 1880, § 2026; 1892, § 1929; 1906, § 2103; Hemingway's 1917, § 1771; 1930, § 1669; 1942, § 566; Laws, 1920, ch. 302; Laws, 1928, ch. 69; Laws, 1975, ch. 373, § 4; Laws, 1989, ch. 582, § 2; Laws, 1994, ch. 430 § 1, eff from and after passage (approved March 17, 1994).

In

CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 28th day of January, 2013, I caused the foregoing REPLY BRIEF OF APPELLANT, WASHINGTON FEDERAL SAVINGS to be served via the methods listed below on the following:

VIA HAND DELIVERY

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